VIRGINIA LAW REGISTER

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Issued Monthly at $5 per Annum. Single Numbers, 50 cents.

All Communications should be addressed to the PUBLISHERS.

Expurgated Edition of Morning Papers.

Apropos of the full publication of the evidence in cases like the Thaw and Strother cases in the daily journals, we know of no suggestion which seems to have more wisdom in it than that made by Mr. Justice Gibson in an action for libel which was tried in the Kings Bench Division before him and which arose out of reports of proceedings in the French courts for divorce. The learned Judge in his charge expressed "his own personal regret that there was not a family edition of the morning newspapers, because these papers often contain an amount of prurient matter which in a French novel would effectually prohibit its intrusion within the circle of any well conducted house." His Lordship further remarked that "although so far as he knew, no prosecution had been instituted, it did not seem that provisions against obscenity might not be invoked"—a reference probably, to the provisions of 20 & 21 Vict. c. 83. Upon the general subject of the publicity of divorce proceedings, Mr. Justice Gibson seems to take a different view from Lady St. Helier, who some years ago, in an article which was generally supposed to express the opinion of her husband, the late President of the Probate and Matrimonial Division, strongly advocated the withholding from publication of divorce proceedings. Mr. Justice Gibson said that he did not think the interests of public life and morality would be favored by proceedings *in camera*. The best guarantee for truth and honor and justice was that the light of publicity should be thrown upon all judicial proceedings. Our authority for the above is the London Law Times.

Virginia lawyers and other Virginians are apt sometimes to growl at their courts and legal procedure. We think it oc-

casionally not only pleasing to our self pride but useful, to see how others look at us. The Honorable Hannis Taylor, a distinguished international lawyer and the editor of the *American Law Review*, in the March-April number of that fine publication, in his article upon "The True Remedy for Lynch Law," has the following to say of Virginia criminal procedure:

A High Tribute to the Law of Virginia Concerning Appeals.

"A beginning should be made with the destruction of the prevailing system of absolute and unqualified criminal appeals, which is the most prolific source of existing evils. Fortunately we have as a standard for imitation the system of review now existing in the ancient commonwealth of Virginia, which has so modified the English system as to remove all its real hardships without impairing its efficiency. The practical operation of the Virginia plan was lately exhibited to the whole country in the famous case of McCue upon which the eyes of the nation were for a time riveted. When his application for a writ of error was made to the Court of Appeals the writer happened to be in Richmond where, as a disinterested spectator, he witnessed the entire procedure as embodied in §§ 4052, 4054, 4055, 4056, 4057, 4058 of the Code of 1904 * * * (here he quotes these sections).

"From these sections it appears that in Virginia a review of a judgment of conviction in a criminal case is a matter of grace and not of right. Every convicted person has the absolute right to present the record of his case, either to individual judges or to the whole Court of Appeals in term time, with a list of the errors of which he complains. Such was the course pursued in the case of McCue, whose counsel presented a record of nearly fifteen hundred typewritten pages, with a list of the errors which they claimed had been committed by the trial judge, together with a brief in support of their contentions. After all these documents had been carefully considered by the judges it was held that the errors assigned were too frivolous to warrant the granting of a writ of error, which was denied. If the judges had considered the errors assigned grave, they would have granted the writ of error, and thereupon the case would have been docketed and heard at the bar. Thus an appeal

upon unsubstantial ground was prevented, after the judges had determined, from a careful inspection of the record, that no good grounds for it existed. The execution which promptly followed prevented an appeal to lynch-law. It is not too much to say that the Virginia plan is ideal. In theory it is perfect, and in practice it has proven entirely efficacious. Under such a system the back-bone of the trial judge is sufficiently stiffened. He does not fear reversal upon a series of frivolous objections; he knows if he conducts the trial firmly and promptly the result will not be a failure of justice, provided no grave error of law is committed. In no state in the Union is the administration of criminal law upon a more wholesome foundation than in Virginia. The trial of the Strothers now in progress for the killing of Bywaters is a striking illustration of the promptness of the trial courts. Within a few months after the tragedy the case is in the hands of the jury. If all the states would simply adopt the Virginia plan, which is proving so efficacious and so just in practice, lynch-law in this country would soon become a thing of the past. No constitutional amendments would be necessary anywhere. Nothing more would be required than a few statutory changes that could be condensed within a very narrow compass. The moment that the people are convinced that they can safely rely upon the courts for the prompt and efficient enforcement of the criminal law, all motive for mob violence will disappear. Until that result is reached Judge Lynch will continue to reign."

Should the "Unwritten Law" Be Written.

An irreverent Englishman once said that the Americans were the greatest "law making" and "law breaking" people in the world. The more laws made, the more there are to break of course, might have been an answer to the witticism. But the fact is that we believe no people in the world rush to the law making power for more remedies for all possible evils, than do the people of these United States, and no people more calmly disregard many of the laws they have demanded. The secular press has lately been devoting some space to a proposition to incorporate into

the statute law of the Commonwealth the so called "unwritten" law. The reason for this is the occurrence of several cases of murder in which the jury declined to convict on the ground that the slayer was avenging a family wrong. The defense of course was insanity—temporary—a "brain storm," as a medical expert has termed it in another jurisdiction. The object of the new law is to prevent this sort of indirection, so those who favor it claim, and to allow as a statutory defense the *arriere pensee* which the jury is supposed to have in its mind when it considers such cases.

Is any legislation on the subject necessary? Is it wise? Should it be seriously considered? We do not believe that on sober second thought any one of these questions can be answered in the affirmative. Cases of the character named are, we are glad to say, rare in the State of late years. The defense made has, as an almost universal thing, resulted in an acquittal. Court and jury and the community as a general thing seemed satisfied with the result. If justice is obtained as the law stands now, why the necessity of any addition to the law?

Is it wise to place on our statute books as a part of our calmly considered legislation a law permitting any man to take into his own hands revenge for any injury, no matter how grievous? Is it not a step backwards, instead of forwards? We have abolished the duello—probably as good a method of allowing a man to resent individual wrongs in a private way as could be devised. Shall we brand the duellist as a murderer, and yet allow a killing—in which usually the man killed is given no chance for his life—to be defended legally as no murder? What offenses shall be set down as justifying homicide, and how are they to be graded? Shall the same right now be granted to the injured wife as to the injured husband? If not, why not? Shall the sister have the right to slay, that the brother has? Who shall define the relationship? Who the degree of the offense? What rules of evidence shall prevail? The mere mention of a few of the difficulties in the way—the wide door to possible crime that might be opened, ought to make law makers and all thinking men ponder well whether in escaping one evil they do not fly to others far more dangerous and the result of which no man can foresee.

When juries begin to *convict* for lack of a defense in cases of this sort, and public conscience is shocked at such convictions, then let us seek a safeguard for the unfortunate slayer in legislation. Until then let us be satisfied with results, which do not seem to call for legislative interference.

Justification for Publishing Strother Case.

One of our subscribers has called us to task for our full report of the case of the Commonwealth *v.* Strother, made in our last number. In our judgment a law periodical is the only one in which such a report should be made in full. To the general public the details of such a case, published in the daily journals, are attractive or repulsive, as one may choose to look at it. It appeals to one class of readers in a prurient way, to another in a painful one. And in addition to this it goes into the hands of a mixed multitude, large in extent, incapable of wise discrimination, and liable to be more hurt than benefited by such a report. In the pages of a law periodical it reaches not only a limited public, but a class of men who read it for information and use—not from idle curiosity. The details of many a valuable surgical operation, if given in the daily press would be horrible and indecent. In the pages of a medical journal they prove helpful to the profession of medicine and useful to humanity. So the report of the Strother case, in a journal read almost, if not entirely by lawyers, is of great value to them in finding out the views of the courts, calling their attention to many questions both of law and evidence and better fitting them for the practice of their profession and the benefit of their clients. We took this view entirely into consideration in publishing our account of the case. We were at a considerable expense to get an accurate report from a purely legal standpoint and not from mere chance reporting. We made it for *lawyers,* and for *their* use and theirs alone, and we feel entirely justified in our own minds, not only as to the usefulness, but the "befittingness" of the REGISTER'S action in the case. We hope our friends will consider it in that light.

When we say that jury trial is a failure in a majority of civil cases, it is with a feeling of security, for we know that our convictions are shared by a large majority of the profession. Some of course are opposed to any changes, and right or wrong, no matter how cumbersome, they believe in clinging to our traditions; these cases are hopeless, and we address our comments upon the jury system to those that believe in changes wherever needed. We know that the present tendency is towards a compromise, or to an agreed case, the purpose of which is to save the expense of a trial and dispense with a jury, and this resort to compromises and agreed cases is due no doubt to the uncertainty of submitting causes to a jury.

Trial by Jury.

The advantages of a trial by a judge over trial by a judge and jury are very numerous. First, the judge must make up his mind one way or the other, consequently the expense resulting from hung juries will be avoided. It is a physical impossibility for a judge to say half his mind is of one opinion and the other half the other, which is often the case with a jury. Thus a definite result is reached, which in most cases is right, for our judiciary has a well-deserved reputation for its purity and learning. If it is wrong it can be corrected by an appellate tribunal. In this way the grievous expense and suspense to the parties of an abortive trial is avoided, not to speak of the scandal.

Secondly, the muteness and often dumbness of the jury makes it impossible for counsel to enlighten them on the points concerning which they are most in doubt. It is almost entirely fighting in the dark so far as they are concerned, and undetected prejudice or external influence is often at work in a manner which it is impossible to counteract. The judge, being a man of intelligence and of long experience in the trial of causes, can ask for information in such a way that counsel can direct his evidence and his arguments to meet the difficulties.

Thirdly, it can only be conjectured what the grounds and the methods were for arriving at the verdict, the jury being incompetent to impeach it, whereas, the judge states his reasons for his decisions, which can be dealt with and considered on appeal. And a fourth reason why the system is a dangerous one is that

some prejudice or hostility by a member of the jury towards one of the parties, which, however, may be unconscious, often turns the scale. And a fifth reason, is that our juries in Virginia now, with upwards of fifty-six exemptions, which we reached at the last session of the legislature, are not composed of men in the community that we would choose privately to arbitrate our differences; in short, they are not composed of the representative men of the community. Sixthly, the obvious difficulties encountered in defining complicated questions of law and fact, so that they may be intelligible to the jury, puts an undue strain on the ingenuity of the judge. A judge with a logical mind can far better deal with that himself, and at a cost of less time and labor, eliminating at once those which are obviously open to only one proper answer than submit them all alike to the jury who often make contradictory findings and reduce the verdict to an absurdity, which must be set aside as contrary to the law and evidence, and the whole cause set back for a new trial.

And then consider in conclusion the great hardships and loss to which jurymen are subjected in attending trials, which, we have attempted to show, could generally be better and more expeditiously conducted without their presence; and this very reason has no doubt led to the regretable number of exemptions from jury duty in this state.

There can be no good reason why, as a rule, the judge on the common-law side, should not try all sorts of civil cases, since the same judge on the chancery side, often disposes of cases vastly more important, and his ability so to do has never been seriously questioned. Therefore, it would seem reasonable and just to largely curtail the rights of either party to demand a jury, and throw the burden of proof of showing that a jury in a given case is desirable, on the party who asks it.

We rejoiced over that decision in which our court repudiated the Scintilla Rule, and regard it as evidence of the growing tendency in this state to lay aside our sentimentality in guarding so jealously the province of the jury.

The foregoing is, of course, written concerning civil causes, but that "these peers" cannot be trusted to sit on this lex non scripta and sit on it hard in criminal cases is evident, and unless

these cases are dealt with according to the law and evidence, leaving all sentiment out of the question, this legalized murder will be used as a cloak for all manner of crime, whenever there is a woman in the case.

That the unwritten law is coming into prominence more and more every day will be admitted on all hands. In the last two years it has been invoked in no less than four murder trials, in which either the slayer or victim, or both were persons of prominence, and in spite of the protestations of counsel, was the sole defense relied on to secure an acquittal. In one there was an acquittal, though both of the murderers were "legally" guilty of a premeditated killing, and in that famous or better notorious Thaw case (we would be glad if it were possible to avoid even the mention of it, "it smells to heaven") as all know, the jury hopelessly disagreed over what was to our mind "a cheap, tenderloin murder," as the learned district attorney characterized it, and that jury was above the average as a representative body of men. And strange to say in this dear old Southland of ours, where chivalry has always reigned supreme, and where we would expect a woman, and especially a pretty one, to get a "square deal," a woman was convicted of voluntary manslaughter for killing a man who had traduced her good fame and insulted her when an explanation was demanded; we refer, of course, to the trial of Mrs. Birdsong in Mississippi. One case, that of Mrs. Bradley for killing former senator Brown, still remains to be tried, and her sole defense, aside from her sex, will no doubt be the unwritten law. To our mind, all this goes to show that trial by jury, in a majority of criminal as well as civil cases, is a failure and this is the conviction of a great number of the profession who have given the matter any thought. Our constitution (1902), art. 3, § 14, preserves that so-called sacred right, with a single exception, in all its pristine glory, and it generally takes a war to amend the Federal Constitution. What is to be done?

Complaint has been made from time to time by many members of the profession that they have suffered serious detriment by

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being unable to obtain promptly the last utterances of the Supreme Court, and we know of one instance already in which the "Virginia Appeals" came as a messenger of peace bringing the case of Fraternities Accident Order *v.* Armstrong; the result was a compromise, and useless and expensive litigation was avoided. The headnotes are carefully prepared, and with unusual brevity, by the erudite and accomplished librarian of the Court of Appeals. We feel sure that this book will be received favorably by the Virginia bar, as it richly deserves to be.

NOTES OF CASES.

Interstate Commerce.—A shipment by express, without order, by a dealer in one state to one whose name he has learned in another, with directions to the express company to collect the price before delivery, is held, in Adams Express Co. *v.* Com. (Ky.) 5 L. R. A. (N. S.) 630, not to constitute interstate commerce.

Telegram—Failure to Deliver—Damages—Conflict of Laws.—Breach of a contract promptly to deliver a telegram to a person in another state is held, in Western U. Teleg. Co. *v.* Lacer (Ky.) 5 L. R. A. (N. S.) 751, to take place at the place where the sendee was, and not at the place where the mistake in changing the address occurred, in the state where the contract was entered into, so that the courts of the former state, in which the action is brought, will apply its own rule as to damages for mental anguish, and not that of the state where the contract was made.

Revival of Suits and Actions—Conflict of Laws.—That an action for personal injuries to a nonresident in the state of his residence may, upon his death, be revived in favor of an administrator appointed for that purpose, is held, in Pyne *v.* Pittsburg, C. C. & St. L. R. Co. (Ky.) 5 L. R. A. (N. S.) 756, where the local statute provides that such action shall not die with the person, although by the law of his residence it would have done so.

Contracts—Signing.—Words written on the back of a contract blank as a portion of the instrument to be signed by the parties are held, in Bonewell *v.* Jacobson (Iowa) 5 L. R. A. (N. S.) 436, to